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Issue date: 18Apr2002

CASE NO.: 2001-LHC-02085

OWCP NO.: 02-127624

In the Matter of

GERALD WEIR
Claimant

v.

UNIVERSAL MARITIME SERVICE CORP..
Employer

and

SIGNAL MUTUAL INDEMNITY ASSOC., LTD.
Carrier

Appearances: Jordan N. Pedersen, Esq.
For Claimant

Christopher J. Field, Esq.
For Employer

Before: Robert D. Kaplan
Administrative Law Judge

DECISION AND ORDER
AWARDING BENEFITS

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq*. (the Act), and the regulations promulgated thereunder. A hearing was held before me in New York, New York on October 22, 2001.[1]

[1]Sea-Land Service Corp. was initially named as an additional responsible employer. However, upon motion of Claimant and Universal Maritime Service Corp. at the hearing, I dismissed Sea-Land Service Corp. as a party, without prejudice. (T 4-8)

Pursuant to my prior rulings, the following exhibits were submitted post-hearing: Deposition of Dr. Steinway (CX 12) and the physician's reports dated May 8 and November 14, 2001 (CX 12 A and 12 B); deposition of Dr. Nehmer (EX 7).[2] These exhibits are herewith received in evidence. Claimant and Employer submitted briefs on February 28 and March 1, 2002, respectively.

I. STIPULATIONS AND CONTENTIONS OF THE PARTIES

The parties stipulated that at all times material herein, beginning on December 11, 1999, Universal Maritime Service Corp. (Employer) and Claimant were in an employer-employee relationship and that they are subject to the Act. The parties further stipulated that as a result of his bilateral carpal tunnel syndrome (CTS) and bilateral trigger thumb conditions, Claimant was temporarily totally disabled from April 17 to November 6, 2000. Finally, the parties stipulated that Claimant's average weekly wage would entitle him to weekly compensation for disability at the maximum compensation rate.

Claimant contends that he was temporarily totally disabled from April 17 to November 6, 2000, due to causally related bilateral CTS and bilateral trigger thumb. In addition, Claimant argues that due to these causally related conditions he has permanent partial disability of his hands under the schedule in § 8(c)(3) of the Act, amounting to 17½ percent of each of his two hands. Employer posits that Claimant's CTS and trigger thumb conditions are not causally related to his employment with it. In the alternative, Employer argues that, at most, Claimant has a 2 percent loss of use of each of his hands.

While Employer contests that Claimant's injuries arose out of and in the course of his employment with it, as well as the extent of the permanent disability, Employer has not controverted that the injuries are now permanent (i.e., that Claimant has reached maximum medical improvement). (Employer's Brief, p. 2: an issue is the "degree of *permanent* partial disability".)

II. THE ISSUES

The issues remaining to be resolved are:

1. Whether Claimant's bilateral CTS and trigger thumb conditions arose out of and in the course of his employment with Employer[3] and, if so,

2. The extent of the permanent disability of Claimant's hands under the schedule in § 8(c)(3) of the Act.

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[2]The following abbreviations are used herein: "CX" denotes Claimant's Exhibit; "EX" denotes Employer's Exhibit; "T" denotes the transcript of the hearing on October 22, 2001.

[3]If Claimant establishes this element, Employer is liable for Claimant's temporary total disability as well as his permanent partial disability, if any.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Summary of the Evidence

Claimant was born on June 11, 1937. He testified that he began working in the longshore industry in 1954 as a checker. Subsequently Claimant held other positions in the industry. In 1986 he began working for Sea-Land Service Corp.(see n. 1, above) as a "location checker" at its waterfront terminal facilities in Port Elizabeth, New Jersey. Claimant testified that he drove a pickup truck around this 70- to 80-acre area in order to determine and record the locations of freight containers that were located there. In doing this work, Claimant first used a pencil and paper, a clip board, and a portable radio or walkie-talkie. After several years, a hand-held computer was introduced for this record-keeping. Claimant testified that entries in the computer were initially made with a magnetic pen. Subsequently, computers with a "button keyboard" were introduced. This device measured about 11 inches by 6 inches with a tapered depth of 3 inches to 1 inch. (T 16-30) On December 11, 1999, Employer took over the operation of the terminal from Sea-Land Service Corp., and Claimant continued to perform the same job for Employer until he retired on October 8, 2001. Claimant testified that he worked a 12- to 16-hour shift, six or seven days a week. (T 31, 34; EX 5, p. 41)

Claimant began to experience pain and numbness in his wrists, hands and thumbs, more in the right hand, about 1995. At that time he visited the ILA Clinic and was examined there by a physician. Claimant stated that he continued to work thereafter, the pain and numbness became progressively worse due to his working and he lost some time from work as a result. About April 1999 Claimant decided that he "couldn't go on with it any more" and returned to the ILA clinic where he underwent nerve conduction testing, and was given a diagnosis of CTS. The ILA clinic recommended that he see Dr. Michael Sternschein, an orthopedist. Claimant saw Dr. Sternschein in February 2000. The physician provided a splint and physical therapy. This resulted in improvement, but the pain returned when the splint was removed. Consequently, Dr. Sternschein performed surgery on the right hand on April 27, 2000. On June 28, 2000, the physician performed surgery on Claimant's right thumb. Dr. Sternschein performed CTS and trigger thumb surgery on the left hand on August 30, 2000. After the surgery, Claimant had physical therapy for the hands. He returned to work in his location checker job on November 6, 2000. Claimant stated that his wrists felt much better than before, but there was "some soreness from the surgery." Claimant did not see Dr. Sternschein subsequently. (T 35-487)

After returning to work on November 6, 2000, Claimant continued to work as a location checker until he retired on October 8, 2001. At the hearing, which took place two weeks after he retired, Claimant was asked if he had any present complaints regarding his hands. He replied:

> Well, I think it's coming back. One of the reasons I retired, I think it's coming back slightly.

Claimant then also testified,

> [I]t was starting to come back when I was working. I felt that it was coming back.

However, Claimant stated that he did not lose any time due to problems with his hands from the time he resumed working until he retired – November 6, 2000 to October 8, 2001. (T 48-49)

B. Discussion

The Injuries Are Causally Related to Claimant's Employment with Employer

Section 20(a) of the Act aids claimants in establishing a causal relationship between injury and employment, stating that "in the absence of substantial evidence to the contrary," it is presumed "[t]hat the claim comes within the provisions of this Act." The Supreme Court in Director, OWCP v. Greenwich Collieries (Maher Terminals, Inc.), 512 U.S. 267, 280 (1994), recognized the continuing viability of the § 20(a) presumption.

Claimant has the burden of establishing the § 20(a) presumption (i.e., the *prima facie* case). To invoke the presumption, a claimant must show that (1) the worker sustained physical harm, i.e., an injury, and (2) a work-related accident occurred, or working conditions existed, which could have caused the harm. Once these two elements have been established a claimant has established a *prima facie* case and is entitled to the presumption that the injury arose out of employment. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981); Frye v. Potomac Electric Power Company, 21 BRBS 194 (1988). If the § 20(a) presumption has been invoked by the evidence, the employer has the burden of establishing the lack of a causal nexus. Dower v. General Dynamics Corp., 14 BRBS 324 (1981). The employer must present evidence that is sufficiently specific and comprehensive to sever the potential connection between the particular injury or disease and the job. Swinton v. J. Frank Kelly, Inc., 554 F.2d 1075, 1082 (D.C. Cir.1976) If the § 20(a) presumption is rebutted, it falls out of the case and all the evidence must be weighed to resolve the causation issue. Del Vecchio v. Bowers, 296 U.S. 280 (1935); Hislop v. Marine Terminals Corp., 14 BRBS 927 (1982).

Claimant relies on the opinions of Dr. Michael Sternschein and Dr. Mitchell Steinway to establish that his bilateral CTS and bilateral trigger thumb conditions arose out of and in the course of his employment with Employer commencing on December 11, 1999. The sole document of record which contains an opinion on the causation issue by Dr. Sternschein is his letter dated February 29, 2000. (CX 3) In this letter Dr. Sternschein described Claimant's work as follows:

> This patient sorts and stacks containers at work all day. He is using his hands continuously in both driving and manual activity.

The physician concluded, "I believe he has developed carpal tunnel syndrome in both hands as a result of this continuous activity." It is clear that Dr. Sternschein's understanding of the exertional requirements of Claimant's checker job was incorrect. Claimant did not stack containers at all, let alone "all day." I therefore find that the opinion of Dr. Sternschein is not probative of any element relating to the issue of whether the injuries were causally related to the job.

Dr. Steinway issued a report dated February 6, 2000 and a follow-up letter dated November 14, 2001. (CX 12A and 12B). In addition, he was deposed on December 18, 2001. (CX 12) The physician opined that Claimant's CTS and trigger thumb were caused by the conditions on his job. Although Dr. Steinway had a misconception about the exertional requirements of Claimant's job that was similar to that of Dr. Sternschein's (see CX 12B), in his deposition the physician provided a general exegesis of the causes of CTS and trigger thumb:

> The most common cause of [CTS] is over-use of the hand or wrist with gradual hypertrophy or increasing size of the transverse carpal ligament. Repetitive trauma, even micro trauma which probably represents the over-use syndrome as well, has been associated [with CTS].
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> * * *
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> Triggering of a digit again is caused by hypertrophy ... in this case [of] the A-1 pulley within the hand. Traditionally, it's been related to rheumatoid arthritis [etc.]. I have been seeing it more and more with people ... doing office work with a lot of calculators and word processing computer work.

(CX 12, pp. 21-22) Claimant's repetitive job duties fit comfortably into the types of repetitive activities that Dr. Steinway explained could cause CTS and trigger thumb. Further, when Claimant's counsel provided Dr Steinway with an accurate description of Claimant's work activities, the physician stated the opinion that his CTS and trigger finger were "due to repetitive micro trauma and over-use of both hands during his years of work, especially those years in which he had to drive a truck, use his fingers for ... the walkie-talkie and also input data into a computer." (CX 12, pp. 23-26) I find Dr. Steinway's opinion to be well-reasoned.

Employer argues that Claimant has not established that Claimant suffered an injury because he has not shown that "injurious working conditions" existed when Claimant was employed by it. Claimant, according to Employer, has failed to establish "the presence of working conditions that could give rise to CTS..." (Employer's Brief, p.10) Therefore, Employer contends, the § 20(a) presumption has not been invoked. Part of Employer's argument consists of the contention that Claimant's use of his hands in driving, and using the walkie-talkie and the hand-held computer amounted to only a brief portion of his work day. However, Employer concedes that Claimant suffered from CTS and trigger thumb. Further, Employer's sole medical expert, Dr. Steven Nehmer, in his deposition on January 3, 2002, conceded that work

activities "involv[ing] using the... hands in a constant repetitive fashion" could cause CTS. (EX 7, p. 13) It is true that Dr. Nehmer opined that Claimant's work activity would not have caused his CTS. But this was in response to Employer's counsel asking the physician to consider hypothetical working conditions (posing as Claimant's actual "testimony") that the job involved driving for "nine minutes per hour and then ... actually typing in numbers and letters into a computer about two and a half to three minutes per hour." Dr. Nehmer replied, perhaps logically, that the "work activity needs to be much more constant and repetitive than the activity you're describing." (EX 7, p. 13-14) However, even if the 12 minutes per hour of work activity using the hands is correct, Dr. Nehmer was not made aware of the testimony of Claimant that the trucks he used to make his way around the facility were difficult to drive and frequently had problems with their power steering. Nor was Dr. Nehmer aware that Claimant worked 12- to 16-hour days six or seven days a week – an average of more than twice the length of the typical work week. Indeed, Dr. Nehmer conceded that the total amount of time a person works is a factor in assessing whether there was repetitive stress. (EX 4, p. 28) In sum, because Dr. Nehmer did not have full knowledge of the conditions attendant to Claimant's job as a checker with Employer, I reject Dr. Nehmer's opinion that those conditions could not have caused CTS and trigger thumb or permanently aggravated those conditions which antedated his employment with Employer.

Based on the foregoing (in fine, my crediting the opinion of Dr. Steinway and rejecting that of Dr. Nehmer), I find that conditions existed at Claimant's job with Employer that could have caused or aggravated his CTS and trigger thumb conditions. Therefore, the presumption in § 20(a) has been invoked. Based on my prior analysis of the evidence, I find that Employer has failed to rebut the presumption. Consequently, Claimant has established that his CTS and trigger thumb are causally related to his employment with Employer.

As a consequence of the above finding, Employer is liable for Claimant's conceded temporary total disability as well as his permanent partial disability.

The Extent of Claimant's Permanent Partial Disability

Claimant contends that he has permanent loss of use of 17½ percent of both his left and right hands, relying on the opinion of Dr. Steinway. Employer argues that, at most, he has a loss of 2 percent of each hand, relying on the opinion of Dr. Nehmer. Although I need not accept the opinion of either physician, and am permitted to arrive at my own conclusion regarding the extent of the disabilities,[4] I find that Dr. Nehmer's opinion is better reasoned than that of Dr. Steinway, and I fully accept Dr. Nehmer's opinion on this issue, as will be fully discussed below.

Dr. Steinway examined Claimant on May 7, 2001. In his report dated May 8, 2001, Dr. Steinway opined that Claimant had a "permanent partial total orthopedic disability of 35% [caused by] occupational

[4]Peterson v. Washington Metro. Area Transit Authority, 13 BRBS 891, 897 (1981).

injury to both hands." (CX 12A) In his note to Claimant's counsel dated November 14, 2001, Dr. Steinway (I am sure, in response to an urgent message from Claimant's attorney seeking clarification) explained: "17½% disability attributed to the right hand and 17½% disability attributed to the left hand." (CX 12B) In his subsequent deposition, Dr. Steinway stated that his opinion was based on the AMA Guidelines, Fourth Edition. Dr. Steinway testified that he relied on his clinical findings of residual scarring of the hand, residual sensory abnormality and the fact that Claimant had surgical procedures on the hands. Subsequently, the physician stated that he relied on weakness in thumb abduction, borderline abnormal two-point discrimination (a sensory test in which the physician placed two ends of a paper clip against the patient's hand) , and "the presence of a surgical procedure on the hand which had left residual scarification." He stated that the scar was sensitive on one hand but not on the other hand. (CX 12, pp. 27-28) Dr. Steinway also testified that he measured the strength in thumb abduction as 4+ out of a maximum of 5, and stated that was "the most minimal strength loss that you can measure." (CX 12, pp. 8, 30) Further, Dr. Steinway stated that Claimant had normal grip strength, normal wrist motion, normal finger motion, and normal sensation except in the two-point testing which was "borderline abnormal." (CX 12, p. 35) However, Dr. Steinway opined that a disability rating of 7 percent of each hand was warranted based solely on the fact that Claimant had undergone hand surgery – even if the hand were entirely normal. (CX 12, p. 36)

Dr. Nehmer examined Claimant on February 15 and August 13, 2001. In his report dated February 16, 2001, Dr. Nehmer stated that Claimant had sensitive surgical scars on the hands, there was full range of motion of the wrists and fingers, and good strength in the upper extremities. The physician opined that Claimant had a permanent loss of use of 2 percent of each hand. (EX 3) In his deposition on January 3, 2002, Dr. Nehmer reiterated his 2 percent rating. He testified that at the February 2001 visit Claimant had good strength and full range of motion of the hands, and he reported that all his symptoms were gone except for some pain in the palm with pressure and some numbness. Dr. Nehmer noted that he had found some sensitivity at the surgical scars and that there was full range of motion at the wrists and fingers and good strength in the hands. The physician stated that under the AMA Guidelines, the highest disability rating of Claimant's hands, after surgery, would be 5 percent. (EX 7, pp. 18-20)

Although the disability ratings by Drs. Steinway and Nehmer are far apart, the two physicians are in fairly close agreement with respect to Claimant's residual pain, diminution in sensory perception, numbness, motion, and strength – all of which are normal, or only minimally deficient or abnormal. With the minimal deficiencies described by Dr. Steinway, I find it difficult to understand how he arrived at his ratings of 17½ percent, even accepting his statement that the AMA Guidelines provide for a 7 percent rating based solely on the fact that Claimant had surgery.[5] In rejecting Dr. Steinway's ratings and accepting

[5]The administrative law judge is not required to apply the AMA Guidelines in measuring disability. Mazze v. Frank Holleran, Inc., 9 BRBS 1053, 1055 (1978).

the 2 percent ratings by Dr. Nehmer, I also note that at the hearing, long after the two physicians examined him, Claimant testified that he *thought* that the CTS was "coming back slightly." "Slightly," indeed. At that point, Claimant had just retired after having functioned in his usual checker job for 11 consecutive months after returning from surgery, without the loss of any time from work during that period. This work history supports Dr. Nehmer's conclusion that Claimant has only a minimal loss of use of his hands. Mazze, 9 BRBS 1053 at 1054-55 (1978)(the judge can consider the claimant's ability to return to work in determining the claimant's physical injury). I therefore find that Claimant has a loss of use of 2 percent of each hand.

C. Conclusion

Claimant is entitled to compensation from Employer for temporary total disability from April 17 to November 6, 2000, at the applicable maximum weekly compensation rates for that period ($901.28 from April 17, 2000 to October 1, 2000, and $933.82 from October 1, 2000 to November 6, 2000).

Claimant is entitled to compensation from Employer for permanent partial disability for loss of use of 2 percent of the hands under the schedule in § 8(c)(3). Compensation for a 100 percent loss of use of a hand is for 244 weeks. Claimant's loss of 2 percent of each hand results in compensation for 9.76 weeks (4.88 weeks X 2), at the maximum weekly compensation rate in effect as of the date he retired, October 8, 2001 ($966.08).

ATTORNEY'S FEE

No award of an attorney's fee for services to the Claimant is made herein since no application for fees has been made by Claimant's counsel. Thirty (30) days is hereby allowed to counsel for the submission of an application for fees conforming to the requirements of 20 C.F.R. §702.132 and §702.133 of the regulations. A service sheet showing that service has been made to all parties, including the Claimant, must accompany the application. Parties have thirty (30) days following receipt of such application within which to file any objections. The Act prohibits the charging of a fee in the absence of an approved application.

ORDER

The District Director shall perform all calculations necessary to effect this Order.

It is ORDERED that Employer Universal Maritime Service Corp. shall pay Claimant Gerald Weir:

1. compensation for temporary total disability at the applicable maximum weekly compensation rates for the period from April 17, 2000 to November 6, 2000, plus appropriate interest;

2. compensation for permanent partial disability pursuant to § 8(c)(3) of the Act for 9.76 weeks at the applicable maximum weekly compensation rate in effect as of October 8, 2001, plus appropriate interest;

3. medical benefits pursuant to § 7 of the Act.

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Robert D. Kaplan
Administrative Law Judge

Cherry Hill, New Jersey